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Supreme Court, U.S.
FILED
AUG 9 1996
CLERK

No. 95-2003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES T. BENSON,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and CONTEL OF VIRGINIA,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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August 1996

12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTRODUCTION 1

ARGUMENT 2

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Bures v. Houston Symphony Society,
503 F.2d 842 (5th Cir. 1974) 8

Clark v. Hein-Werner Corp., 8 Wis. 2d 264,
99 N.W.2d 132 (1959) 6

Ramsey v. NLRA, 327 F.2d 784
(7th Cir. 1964) 8

Smith v. Hussman Refrigerator Co.,
619 F.2d 1229 (8th Cir. 1980) 6

Steele v. Louisville & Nashville
Railroad Co., 323 U.S. 192 (1944) 7, 8

Steelworkers v. Sadlowski,
457 U.S. 102 (1982) 7

Steelworkers v. Weber,
443 U.S. 193 (1979) 7

TABLE OF AUTHORITIES - *Continued*

Page

Cases

Thompson v. International Association of Machinists, 258 F. Supp. 235 (E.D. Var. 1966) 6

Rule

Rule 15.6 of the Rules of the Supreme Court of the United States 1

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to this Court's Rule 15.6, petitioner James T. Benson files this reply to the Brief in Opposition for Communications Workers of America ("CWA Br").

ARGUMENT

A. CWA's opposition avoids the basic issue of the Janus-like behavior that caused its breach of the duty of fair representation ("DFR").

1. CWA claims it never "advance[d] any argument concerning the relative qualifications of Ms. Kirker or Mr. Benson", but instead "consistently argued throughout [the arbitration] that the [collective-bargaining] agreement contained a 'sufficient ability' clause, under which seniority governs among minimally qualified applicants".[1] This would come as a surprise to arbitrator Harlan, who noted that "[b]oth Management and the Union went into considerable detail in their Briefs discussing qualifications", and who ruled that "Barbara Kirker * * * [i]s as qualified or nearly as qualified as James Benson".[2] It would also come as a surprise to the Magistrate Judge, who (on the very page CWA cites in support of the contrary proposition) observed that "CWA took the position that 'best qualified senior applicant' required Contel to select Kirker, because Benson had 'less seniority *and less Contel schooling*'".[3] These statements clearly point to a "relative-qualifications" argument by the union which the arbitrator wrongly found persuasive.

Contrary to CWA's suggestion, Benson has never contended that CWA originally argued a "seniority" theory that ignored *all* considerations of qualifications. What Benson calls CWA's "strict-seniority" theory assumed that an employee had at least *minimal* qualifications for the job. But no one ever doubted that Kirker and Benson both had at least minimal qualifications. As CWA originally treated the grievance, the practical issue was whether the promotion should be given on the basis of seniority only, precisely because Benson and Kirker were both at least minimally qualified and CWA assumed that only minimal qualifications were necessary. This is why CWA's attorney testified that "nothing [Benson] could have

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[1] CWA Br at 2, 5 n.1.

[2] Petition at 67a, 75a.

[3] *Id.* at 20a (emphasis supplied), *cited in* CWA Br at 2.

told me * * * would have been relevant to the issue in arbitration".[4] When relative qualifications emerged as the issue at the arbitration-hearing, CWA was faced with—and argued successfully, to Benson's detriment—a theory *new* to it, as to which Benson could most definitely have told the union many things that "would have been relevant", had CWA bothered to give him a hearing.

2. CWA *wrongly* states that "Benson does *not* maintain that CWA breached its duty [of fair representation] by failing to give him a 'hearing upon its proposed action' in prosecuting the promotion bypass grievance. *See* Pet. 17."[5] The *only* way in which CWA would not have breached its DFR by failing to give Benson notice and hearing would have been if the union had never argued, and the arbitrator had not decided the case on the basis of, relative qualifications. Once relative qualifications became an issue, CWA had a patent conflict of interest between Benson and Kirker, which it could resolve only by giving Benson *some* hearing, instead of none at all.[6]

3. CWA defends its conduct by saying that "'a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union behavior is so far outside a "wide range of reasonableness" as to be irrational'".[7] At the time of the union's action that was the proximate cause of Benson's loss of his promotion—when CWA argued relative qualifications before arbitrator Harlan—CWA knew or should have known it had an irresolvable conflict of interest that required some action to protect *Benson's* interests, to whom the union owed the DFR. But CWA never took even the first rational step in that direction: interviewing Benson to determine if his qualifications were in fact superior to Kirker's. Rather, from the very onset of and throughout the grievance, CWA's attorney took the head-in-the-sand position that

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[4] Petition at 113a-14a.

[5] CWA Br at 5.

[6] *See* Petition at 14-17.

[7] CWA Br at 5.

"nothing [Benson] could have told me * * * would have been relevant to the issue in arbitration".[8] If simply refusing to ascertain the very facts that proved controlling in the arbitration, from the employee whose interests were most crucially affected by the presentation of those facts, is not *un*reasonable "representation", nothing is.

4. CWA also defends its conduct by saying that it "relied on a recent arbitration decision under the same contract in advancing an interpretation that favored seniority".[9] This is only half true. Initially, CWA relied on the "Ables Award", under which the seniority of *minimally* qualified applicants would have controlled the award of the promotion—and under which Benson's participation in the grievance-arbitration process might arguably have been unnecessary. In the arbitration, however, arbitrator Harlan ruled the Ables Award *in*applicable, and that *relative* qualifications had to be considered. At that point, CWA could not—and, prevailing in the arbitration, self-evidently did not—rely any further on the Ables Award to justify freezing Benson out of the process and taking away his promotion. So, CWA's initial reliance on the Ables Award, even if arguably reasonable at that time, cannot constitute a defense for its later misconduct.

5. CWA contends that its desire to present "a united front" exonerates it from "failing to invite Mr. Benson to participate in the arbitration hearing".[10] This argument would be understandable had CWA argued *only* its "strict-seniority" theory—for then the union would have had no conflict of interest between Benson and Kirker, and could arguably have seen Benson simply as "a witness supporting the very Company decision being challenged by the Union".[11] When relative qualifications emerged as the issue, however, Benson could and should have been seen—and would have been seen, had CWA bothered to investigate the matter—as a

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[8] Petition at 113a-14a.

[9] CWA Br at 6.

[10] CWA Br at 6 (footnote omitted).

[11] *Id.*

witness supporting the position *the union* should have taken consonant with its DFR towards him. At that point, Benson's was not a "'separate interest[ ]'" (as CWA wrongly contends[12]), but the interest the union should have championed. At the very minimum, CWA either itself should have investigated the issue of relative qualifications or allowed Benson personally to present his own evidence at the arbitration hearing.

Vapid is CWA's notion that Contel adequately made Benson's case, because "'the arbitrator would be more interested in Contel's assessment...than in Benson's assessment'".[13] The factual focus of the case before arbitrator Harlan was the relation of Benson's prior work-experience *outside of Contel* to the qualifications on the Notice of Job Opening. All Contel could and did present on this subject was hearsay filtered through a Contel witness who had *no* personal knowledge of, let alone work-experience as to, Benson's prior employment. As the man who had *actually worked* both on the previous jobs outside of Contel and in the Contel Service-Technician job after his initial promotion, Benson was *uniquely* qualified to describe to the arbitrator the practical, on-the-job relationship between his prior experience and his then-present position. Depriving Benson of an opportunity to testify at the hearing denied the arbitrator the *only* source of complete information on the subject.

In sum, CWA begs the question when it argues that the DFR does not "prevent[it] from forcefully advocating a single interpretation of the [collective-bargaining] Agreement".[14] For, here, CWA did *not* advocate "a *single* interpretation", but *two*—the first ("strict-seniority"), uniquely favorable to Kirker, whom the union represented "forcefully"; the second (relative-qualifications), arguably favorable to Benson, whom the union represented not at all.

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[12] *Id.*

[13] *Id* at 6 n.2.

[14] *Id.* at 7.

B. CWA is wrong to deny that a serious conflict exists among the courts as to the Circuit Court's construction of the DFR in this case.

1. *Pace* CWA, Benson does not rely "primarily upon the *Smith* plurality opinion", but upon a careful parsing of *all* the non-dissenting opinions in *Smith* v. *Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1980).[15] CWA's further point that, unlike the union in *Smith*, it did make "'an informed, reasoned judgment regarding the claims in terms of the language of the collective bargaining agreement'" based on the Ables Award,[16] is simply wrong. Even if CWA's reliance on the Ables Award was "informed" and "reasoned" *before* the arbitration-hearing took place, *at the hearing* CWA "went into considerable detail in [its] Brief[ ] discussing qualifications"—and, indeed, won the arbitration on the arbitrator's finding that "Barbara Kirker * * * [i]s as qualified or nearly as qualified as James Benson".[17] At the point that relative qualifications became the key issue—and an issue on which Benson could and should have prevailed—CWA's decision to continue not to represent Benson at all was anything but reasonable, but was an out-and-out abnegation of its DFR.

2. *Pace* CWA, Benson's reading of *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959), is not a matter of his personal "rewriting" that "relies entirely on *Thompson v. Int'l Ass'n of Machinists*, 258 F. Supp. 235 (E.D. Va. 1966)", but instead finds support in other decisions of the Wisconsin Supreme Court so interpreting *Clark*.[18]

C. Finally, CWA's denial that NLRA § 9(a) embodies "state action" is dead wrong.[19]

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[15] *Contrast* CWA Br at 7 *with* Petition at 18-19.

[16] CWA Br at 7-8.

[17] Petition at 67a, 75a.

[18] *Contrast* CWA Br. at 8-9 & n.4 *with* Petition at 19 n.36.

[19] *See* CWA Br at 9-10.

1. That the complainant union members in *Steelworkers* v. *Sadlowski*, 457 U.S. 102 (1982), unsuccessfully attempted to invoke the governmental-action doctrine of *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), is beside the point.[20] In *Sadlowski*, the complainants challenged an *internal* union election-rule, not union action alleged to violate the DFR. This Court rejected the claim that the First Amendment applied to the rule, on the ground that "the union's decision to adopt [the] rule does not involve state action".[21] But the union in *Sadlowski* did not adopt its election-rule under color of NLRA § 9(a); whereas, here, CWA deprived Benson of property without procedural due process, precisely under color of that statute.

The case *Sadlowski* cited, *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), helps CWA not at all, either. In *Weber*, the complainant emphasized that "[t]his case arises under Title VII. *No claim for relief based on the constitution is presented.*"[22] This Court did note, by way of *dicta*, that, "[s]ince the Kaiser-UAW plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment".[23] But the observation that unions and employers acting under the *federal* NLRA have not received the imprimatur of *State* power that would subject them to the *Fourteenth* Amendment says nothing about whether they have received the imprimatur of *Congressional* power that subjects them to the *First* and *Fifth* Amendments. *Steele*, after all, held that in exclusive representation "*Congress* has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body".[24]

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[20] *Pace* CWA Br at 9.

[21] 457 U.S. at 121 n.16.

[22] Brief of Brian F. Weber at 46 (footnotes omitted)(emphasis supplied).

[23] 443 U.S. at 200.

[24] 323 U.S. at 202 (emphasis supplied).

2. CWA's only other new case, *Ramsey* v. *NLRA*, 327 F.2d 784 (7th Cir. 1964),[25] provides no better support for the union's errant position. For *Ramsey* merely asserts—with no analysis of or even citation to any of this Court's decisions—that "[t]here is no statutory or constitutional right of an employee to be present at an arbitration hearing".[26] That statement, however, is plainly wrong, in that the DFR—which courts read into NLRA § 9(a)—*does* provide employees with such a "statutory" right in some cases.[27] Whether there is also an effective *constitutional* right depends upon this Court's enforcement of *Steele's* mandate that, to be constitutional, exclusive representation must impose upon a union the duty "to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining * * * *and to give them notice of and opportunity for hearing upon its proposed action*".[28] If Benson's "statutory" right (the DFR) does not protect him against *ersatz* "representation" by CWA that licenses the union simultaneously to promote the interests of another, antagonistic employee and to prevent Benson from protecting his own interests, then the constitutional issue reserved in *Steele* arises in all its starkness—and this Court must apply the right *Steele* recognized for Benson to receive "notice of and opportunity for hearing upon [CWA's] proposed action".

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[25] CWA Br at 9 also cites *Bures* v. *Houston Symphony Society*, 503 F.2d 842 (5th Cir. 1974). Benson has already distinguished *Bures* in Petition at 21.

[26] 327 F.2d at 787.

[27] *See* Petition at 18-19.

[28] 323 U.S. at 204 (emphasis supplied).

CONCLUSION

For the foregoing reasons and the reasons set out in Benson's original petition, this Court should issue a writ of certiorari.

Respectfully submitted,

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